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No. 75-1

In the Supreme Court of the United States

OCTOBER TERM, 1975

REX STIDHAM WINDOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of uttering eight government checks bearing forged endorsements, in violation of 18 U.S.C. 495. He was sentenced to concurrent terms of seven years' imprisonment on each count. The court of appeals affirmed (Pet. App. A; 510 F. 2d 989).

The evidence showed that early in 1972 Raymond Starns was attempting to sell his financially troubled business to petitioner, who represented himself to be George Boyd, the president of Tri State Motor Transit, a Missouri corporation (Tr. 12-13, 18-19, 24-25). In the course of their negotiations, Starns introduced petitioner to James Maxwell, the president of the First National Bank of Denham Springs, Louisiana, in order to facilitate the opening of an account at the bank by petitioner (Tr. 15-16, 108-109). Petitioner represented

himself to Maxwell as George Boyd and sought to open an account by depositing eight government checks payable to Tri State Motor Transit. Maxwell typed Tri State's endorsement on the eight checks, and petitioner represented that the endorsements were true and authorized. Petitioner signed the signature card for the account as "George Boyd, Sr., President" (Gov't Ex. 9A; Tr. 109-112).

Petitioner thereafter drew on that account a check for $35,000, which he signed "George Boyd" (Tr. 19-25; Gov't Ex. 11A). The real George Boyd testified that all of his company's banking was handled in Missouri and that the signatures on the documents were not his (Tr. 5-10).

1. Petitioner contends (Pet. 7-10) that, because he delivered the eight forged checks at one time to the same recipient, it was a "single transaction" for which eight separate punishments are improper. Since petitioner received identical concurrent sentences on each of the counts, however, there is no need for the Court to consider the issue. See *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.

In any event, as the court of appeals correctly stated, "[e]ach check was a separate document, requiring a separate endorsement, and thus was uttered individually" (Pet. App. 26). There is here no ambiguity with respect to the appropriate unit of prosecution and therefore no reason to invoke the "rule of lenity" (*Gore* v. *United States,* 357 U.S. 386, 391). The act proscribed by 18 U.S.C. 495 is fraudulent uttering. Petitioner committed eight such acts. That those eight acts of uttering were part of a common scheme or that they occurred at about the same time does not deprive them of their

distinctiveness and does not make it any less appropriate to prosecute and punish separately for each violation.[1]

2. Petitioner argues (Pet. 11) that the district court improperly failed to give the jury a cautionary instruction concerning the testimony of an accomplice. Since petitioner neither requested such an instruction nor objected to its omission, however, his claim is precluded by Fed. R. Crim. P. 30. Even if the failure to give such an instruction *sua sponte* might be regarded as plain error where the accomplice's testimony is the only direct evidence against the accused and where the evidentiary issues are close (see Pet. App. 25), the evidence here was overwhelming and most of it was presented by non-accomplice witnesses.[2]

3. Petitioner contends (Pet. 12-13) that the jury was improperly instructed on aiding and abetting because the evidence showed that he was the principal. As the court of appeals stated, however, the jury could have

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[1] *Bell* v. *United States,* 349 U.S. 81, is inapposite. The Court there invoked the rule of lenity in construing the Mann Act, 18 U.S.C. 2421—which proscribes the transportation of any woman in interstate commerce for an immoral purpose—because it was unclear what Congress intended to be the unit of prosecution. Since "[t]he constitutional basis of the statute is the withdrawal of 'the facility of interstate transportation' " (349 U.S. at 83), and since the simultaneous transportation of more than one woman across state lines involves only a single act of interstate transportation, the Court concluded that the will of Congress was at best "undeclared" and that "the ambiguity should be resolved in favor of lenity" (*ibid.*). There is no similar ambiguity in Section 495. The aim of the statute is to protect government property from fraudulent claims, and each falsely uttered government check subjects government property to a separate false claim. The other cases relied upon by petitioner (Pet. 8-10) are similarly distinguishable.

[2] Contrary to petitioner's suggestion (Pet. 11), there was no evidence that Maxwell was an accomplice in petitioner's scheme. He was granted immunity with respect to matters unrelated to this case (Tr. 123).

found that Starns was not forthright in his testimony and that he was in fact the principal while petitioner was merely assisting him (Pet. App. 24-25):

> Starns had testified that on one occasion prior to the time he and Windom deposited the government checks in the Denham Springs bank, he, Starns, the close associate of Windom in depositing the checks, had deposited $300,000 in stolen U.S. Treasury notes in the same bank as collateral for a loan he was arranging for some associates. This testimony could have given rise to an inference, if the jury saw fit to accept it, that if Windom was not acting on his own behalf when he deposited the checks he was aiding and abetting Starns in his various activities associated with stolen government checks and securities.

4. Petitioner further argues (Pet. 13-14) that the district court should not have allowed inconclusive expert handwriting testimony when the parties had already stipulated that the expert's analysis was inconclusive, and that the prosecutor improperly referred to petitioner as a "con artist."

As the court of appeals correctly stated, however, the expert's testimony was collateral to the principal issue in the case concerning forged *typewritten* endorsements, and the testimony, in any event, "did not contradict the stipulation" (Pet. App. 23) or in any way prejudice petitioner.

Nor was a mistrial required because of the prosecutor's remark. As the court of appeals stated, while "prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained, abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is * * * the law remains that unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence" (Pet. App. 26).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.